UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 2

In the Matter Of:

DALTON SCHOOLS, INC. d/b/a
THE DALTON SCHOOL,

Respondent,

Case No. 02-CA-138611

-and-

Oral Argument Requested

DAVID BRUNE, An Individual,

Charging Party.

RESPONDENT THE DALTON SCHOOLS, INC.'S d/b/a THE DALTON SCHOOL BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR J. AMCHAN

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent Dalton Schools, Inc. d/b/a The Dalton School (the "Respondent" or "Dalton") respectfully submits the following brief in support of its exceptions to the June 1, 2015 Decision of Administrative Law Judge Arthur J. Amchan (the "Judge") and in support of its renewed request for dismissal of the Charging Party David Brune's (the "Charging Party") Complaint in this matter (the "Complaint").

STATEMENT OF THE CASE

After a full and complete hearing of the issues in this matter, Respondent presented three legal issues to the Judge in its post-hearing brief:

- **Whether the Charging Party's opprobrious February 6, 2014 email communications addressed to his colleagues constituted "protected concerted" activity under the meaning of Section 7 of the National Labor Relations Act (the "Act");**

- **Whether Dalton had knowledge of any purportedly "protected concerted" activity at the time that it rescinded the Charging Party's teaching contract for the 2014 – 2015 academic year; and**

- **Whether Dalton rescinded the Charging Party's teaching contract for the 2014 – 2015 academic year as a result of the Charging Party's participation in what the Charging Party alleged constituted "protected concerted" activity as defined by Section 7 of the Act.**

The substantial weight of the evidence in the record confirms that the answer to these three legal issues is an unequivocal "no." The Judge consolidated these three legal issues by arriving at two conclusions of law – namely that: (1) Respondent violated Section 8(a)(1) of the Act in rescinding the Charging Party's teaching contract for the 2014 – 2015 academic year; and (2) Respondent further violated Section 8(a)(1) in purportedly "interrogating" the Charging Party in connection with his allegedly "protected concerted" activity. The Judge's conclusions contained fatal errors of fact and law which warrant reversal of the Judge's Decision, granting of the exceptions therefrom, and dismissal of the Complaint under well-settled Board and federal

law. To grasp the materiality of the Judge's errors, a recitation of the facts in the record is necessary.

The Complaint in the instant matter charged Respondent with violating Section 8(a)(1) of the Act by rescinding the Charging Party's annually-renewable teaching contract for the 2014 – 2015 academic year because he was allegedly engaged in "protected concerted" activity when, on February 6, 2014, he sent an e-mail thread to his colleagues within the Theater Department that included a vitriolic and *ad hominem* attack against Dalton's Head of School. Although the Charging Party alleges that the basis of his non-renewal was his engagement in "protected concerted" activity, the weight of the evidence does not support this allegation for several reasons, as explained in more fulsome detail below.

First, the Charging Party's allegedly "protected concerted" e-mail thread sent on February 6, 2014, is not "protected concerted" activity because the Charging Party did not address actual terms and conditions of employment or mean to induce group action, as required under relevant Board decisions and federal case law. Instead, the Charging Party's February 6, 2014 e-mail thread amounts to nothing more than an *ad hominem* attack on the senior administration, and "griping" regarding Dalton's handling of a community-wide controversy over the school's performance of the musical *Thoroughly Modern Millie*. Indeed, the Chair of the Theater Department chose to single out a portion of this February 6, 2014 e-mail thread for reporting to the Head of School due to its clear and complete departure from the collective sentiments of the Theater Department and from standards of accepted conduct within an academic setting.

Next, at the time Dalton's senior administration rescinded the Charging Party's teaching contract for the 2014 – 2015 academic year, it had no knowledge of the existence of a broader,

group-wide e-mail dialogue amongst members of the Theater Department, the content of such discussions, or the Charging Party's participation in any such dialogue. Therefore, it is implausible that the non-renewal of the Charging Party's teaching contract was based on the Charging Party's participation in any such group-wide dialogue. Instead, the record confirms that the senior administration's decision to rescind the Charging Party's teaching contract was directly predicated on the Charging Party's unprofessional, uncollegial and disloyal conduct that persisted despite previous warnings from the senior administration.

Finally, even assuming *arguendo* that the Charging Party was engaged in "protected concerted" conduct in crafting the February 6, 2014 e-mail thread that is at issue in the instant matter – an e-mail thread that the Charging Party's supervisor identified as rouge and ultimately reported to the senior administration – the opprobrious nature and content of this e-mail removed it from the Act's protection. Accordingly, and as will be explained in greater detail below, the Charging Party's Complaint must be dismissed in its entirety.

STATEMENT OF MATERIAL FACTS

A. Dalton's Interest in Fostering and Maintaining Mutual Respect Among Faculty

Dalton is an independent, co-educational day school for grades K-12 located at 108 East 89th Street on the Upper East Side of Manhattan. GC-10 at ¶ 1 (Aff. of Ellen Cohen Stein); GC-11 (Aff. of James Best) at ¶ 1; Tr. 17:16-18.

Ellen Stein has served as Dalton's Head of School for the past fourteen years. Tr. 16:20-23. In fact, Ms. Stein has been a member of the Dalton community for most of her professional life. Tr. 12:1-5. As the Head of School, she is responsible for "run[ning] the school." *Id*. In this capacity, Ms. Stein has a large constituent body that she works for and with, as well as a number of direct reports, including James Best and Lorri Hamilton Durbin. *Id*. For the past ten

years, James Best has served as Dalton's Associate Head of School. Tr. 146:12-16. For the past four years, Lorri Hamilton Durbin has served as the Director of the Middle School at Dalton. Tr. 164:1-5.

Dalton is committed to fostering an academic environment that encourages "inclusiveness, an open and constructive exchange of ideas, and an emotionally and socially safe community." R-2 (Faculty Supplement to the Employee Handbook) at 22. Dalton is governed by a Code of Conduct which requires that all of its teachers "exemplify professionalism, dedication, and enthusiasm for their work." *Id.* at 4. Indeed, Dalton teachers are expected to adhere to a set of roles and responsibilities including "exhibit[ing] a spirit of willingness and collaboration" (*id.* at 23), serving as "role models for students" (*id.*), as well as serving as "good colleagues" (*id.*) to their peers. In fact, in deciding whether to renew a teacher's teaching contract, the Dalton administration considers these factors, including whether the teacher has adhered to "the roles and responsibilities of a Dalton teacher" as set forth in the Dalton Handbook (Tr. 19:15-18; R-2), as well as the teacher's workplace "conduct" (Tr. 19:24-25), his or her "contributions" to Dalton (Tr. 20:4-6), and his or her "interactions with colleagues." *Id.* Each year, the Dalton administration assesses each teacher's conformance with these expectations and requirements and decides whether to renew his or her teaching contract accordingly. Tr. 18:14-16; Tr. 19:15-18.

As with all Dalton teachers, the Charging Party's teaching contract was renewable on an annual basis. Tr. 18:11-13. On or around February 3, 2014, Dalton offered the Charging Party a renewal contract for the 2014 – 2015 academic year which the Charging Party testified that he signed and executed "a few days afterward." Tr. 86:20-25; Tr. 87:1; GC-2 (February 3, 2014 Offer Letter and Contract of Employment for the 2014 – 2015 academic year).

At the hearing, the Charging Party testified that, at the time he signed his renewal contract, he understood that his continued employment at Dalton was subject to the Dalton Code of Conduct, including, but not limited to, the expectations and requirements outlined in the faculty guide and employee handbook.[1] Tr. 79:21-24; Tr. 86:2-8; R-1 (Handbook Acknowledgment Form Dated August 16, 2001); R-2. Indeed, the Charging Party understood that he had a continuing obligation to remain professional at all times during his employment at Dalton (Tr. 84:13-17), and that violating Dalton's code of professional ethics could lead to disciplinary action including termination. Tr. 83:22-25. In fact, as will be explained in more detail below, despite an admitted understanding of Dalton's clearly-articulated expectations of professionalism from its teachers, the Charging Party often flouted Dalton's expectations for collegial conduct. Tr. 79:21-24; Tr. 86:2-8; R-1; R-2. For example, Dalton administrators received complaints regarding the Charging Party's uncollegial behavior and his inability to communicate productively, including sending expletive-filled e-mails to his colleagues (Tr. 107:8-13; 108:1-8; R-4 (November 20, 2014 E-mail from the Charging Party to the Theater Department list-serv), and including irreverent comments in his student progress reports. Tr. 87-3-5; R-3 (April 28, 2010 Written Warning Letter from Jim Best, Associate Head of School, to the Charging Party). The Charging Party does not contest that he was reprimanded for his inability to communicate effectively with his colleagues and with parents and students. Tr. 87:3-5; R-3. This failure to communicate effectively contributed to "problems" with his colleagues within the Theater Department. Tr. 88:23-25.

[1] The Judge's finding that "portions of the handbook violate Section 8(a)(1) has no basis in fact or law. Indeed, it is well-settled that Implementation of workplace rules and disciplinary procedures are among the most common examples of managerial action. See *Niagara Hooker Emps. Union v. Occidental Chem. Corp.*, 935 F.2d 1370, 1377 (2d Cir. 1991). It is squarely within the "prerogatives of management" to institute and maintain legitimate workplace policies and disciplinary procedures. *Id.*

B. The Dalton Theater Department &The Charging Party's Role as Technical Director

Dalton employed the Charging Party as Technical Director of the Theater Department beginning in September 2001. Tr. 30:5. During the Charging Party's employment tenure at Dalton, the Theater Department consisted of five individuals – namely: (1) Robert Sloan, the Chair of the Theater Department and the Charging Party's supervisor; (2) the Charging Party; and the following teachers: (3) Kevin Gallagher; (4) Meg Zeder; and (5) Allen Kennedy. Tr. 25:1-8; Tr. 30:12-15. As Chair of the Theater Department, Robert Sloan[2] was vested with the authority to effectively "run" the Theater Department, including "hiring and alerting administrators above him if there [were] any serious problems in the Department." Tr. 179:12-16.

During his employment with Dalton, the Charging Party taught coursework in theatrical production and stage craft (Tr. 31:21-23), served as a faculty advisor for several student groups (Tr. 31:23-24), and was responsible for overseeing the technical aspects of Dalton's theatrical productions. Tr. 32:1-6.

[2] Although the Judge erroneously – and without any basis – concluded that "[Robert] Sloan's exercise of authority is too isolated to qualify him as a Section 2(11) supervisor" (D. 8, fn.8), such conclusion is contrary to the evidence in the record. Indeed, Respondent has met its burden of establishing Robert Sloan's supervisory status within the meaning of Section 2(11) of the Act. In fact, even Counsel for the General Counsel repeatedly admitted that Mr. Sloan's supervisory authority was not "an issue in this case." Tr. 111:15-17. Section 2(11) of the Act defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 USC § 152(11). Here, Ms. Stein's hearing testimony clearly established that, all relevant times during the Charging Party's employment with Dalton, Mr. Sloan exercised supervisory authority over the Charging Party. As Chair of the Theater Department, Mr. Sloan's job responsibilities include: "run[ning] the Department, help[ing] with the hir[ing] and alert[ing] administrators above him if there are any serious problems in the Department." Tr. 179:12-16. In addition, due to his supervisory responsibilities, Mr. Sloan receives additional compensation and a reduced course load. Tr. 180: 21-22 ("[Department Chairs] are given a stipend . . . and typically a one-course release.").

C. The Thoroughly Modern Millie Controversy

In his capacity as Technical Director, the Charging Party was responsible for tending to the technical aspects of Dalton's theatrical productions. Tr. 32:1-6; Tr. 33:22-25. In the 2013 – 2014 academic year, the Theater Department elected to perform *Thoroughly Modern Millie* as the middle school musical. Tr. 33:3-9. After "discussing it within the [Theater] department and with the music director" (Tr. 33:6-9), as was standard protocol, the Theater Department sent "a copy of the script and a CD of the music" to Ms. Durbin (Tr. 33:5-9), the Director of the Middle School, for her approval. Tr. 33: 6-19. Accordingly, after receiving the "go ahead" (Tr. 34:20-25) and nearly eight months in advance of opening night, the Theater Department began preparing for the production. Tr. 34:24-25.

However, in early to mid-January 2014, while rehearsals for the production were underway, Ms. Stein began receiving complaints from parents, alumni, board members, faculty members, administration and students (Tr. 134:22-25; Tr. 135:3-14, 24-25; Tr. 136:1-20), concerning the "appropriateness" of the Theater Department's selection. Tr. 165:1-5. The gravamen of these complaints was that *Thoroughly Modern Millie's* use of racial stereotypes was offensive and inappropriate for a Dalton student production. Tr. 150:1-4. Indeed, the Charging Party testified that, in light of the complaints that Dalton received, the musical required two separate revisions. Tr. 93:23-24.

Initially, the Chair of the Theater Department and a member of Dalton's History Department re-wrote the play as a musical revue with all of the original dialogue removed. Tr. 94:14-24. Later, Dalton students, who the Charging Party testified "did not want to see it turned into a revue" (Tr. 97:5-14) and instead wanted to perform the musical in as "original a form as possible" (*id.*), re-wrote the script, including removing all "offensive or inappropriate"

references. Tr. 97:15-18. The Dalton administration and the original playwright approved these student-authored changes to the script. Tr. 97:22-24. Likewise, the Theater Department did not object to the student re-write. Tr. 98:2-5.

During the final week of January 2014, the students performed the student-modified version of *Thoroughly Modern Millie* to a "house [that] was packed every night." Tr. 34:16-19; Tr. 44:3-7. At the hearing, the Charging Party testified that three hundred (300) to three hundred fifty (350) people attended each night of the performance. Tr. 44:6-7.

D. The Charging Party's Opprobrious February 6, 2014 E-mail

Despite the overwhelming success of the musical (Tr. 99:8-10), on or around February 11, 2014, Mr. Sloan, the Chair of the Theater Department and the Charging Party's supervisor, alerted Ms. Stein to the fact that he had received what he described as "a very unpleasant e-mail" from the Charging Party. Tr. 144:12-13. In response to the Chair of the Department's complaint, Ms. Stein asked to see the e-mail to which Mr. Sloan was referring. *Id*. On or around February 11, 2014, Mr. Sloan shared *only the text* of the Charging Party's "very unpleasant e-mail" (*id.*) with Ms. Stein. GC-3 (E-mail from Robert Sloan to Ellen Stein dated February 11, 2014). In this e-mail, the Charging Party characterizes Ms. Stein as a "liar" who is "[not] honest, [not] forthright, [not] upstanding, [not] moral, [not] considerate [and] much less intelligent or wise." *Id*. During his hearing testimony, the Charging Party unequivocally admitted to having authored these words and identified them as being part of the e-mail thread that he authored on February 6, 2014. Tr. 109:4-22. Indeed, on their face, the Charging Party's statements about the Dalton administration are "unprofessional, inappropriate and uncollegial." Tr. 138:18-20.

E. The Dalton Administration's March Meeting with the Charging Party[3]

[3] The events described herein transpired on or around the indicated dates.

The Charging Party testified that on or around March 11, 2014 (Tr. 103:15-17), he met with Ms. Stein, Mr. Best, and Ms. Durbin (the "March meeting") for what the Charging Party characterized as "a discussion about the play" during his hearing testimony. Tr. 67:20-21. The Charging Party testified that this meeting was "essentially a debriefing meeting" (Tr. 68:10-11; Tr. 100:13-18) where the senior administration "asked for [the Charging Party's] opinion" about the *Thoroughly Modern Millie* controversy. Tr. 68:12. The Charging Party testified that, at this meeting, the February 6, 2014 e-mail thread was neither mentioned nor discussed. Tr. 69:2-4. Instead, the discussion was focused on "thinking through ways that [Dalton] could think positively about the community and learn from the *Thoroughly Modern Millie* experience." Tr.167:10-13. As part of this discussion, the senior administration asked the Charging Party whether he had ever accused the Dalton administration of being "dishonest" and "immoral." Tr. 151:15-20; Tr. 167:5-16. At this meeting, the Charging Party unequivocally denied making any negative comments about the Dalton administration. Tr. 151:19-25; Tr. 152:1.

F. The Dalton Administration's April Meeting with the Charging Party & Dalton's Rescission of the Charging Party's Employment Contract

On or around April 17, 2014, the Charging Party again met with Ms. Stein and Mr. Best (the "April meeting"). Tr. 69:22-25. At this meeting, Ms. Stein and Mr. Best presented the Charging Party with the opprobrious portion of his February 6, 2014 e-mail thread and asked him whether he had authored the statements in question. Tr. 70:6-8. Despite having earlier denied making any such statements, when shown the text of his February 6, 2014 e-mail, the Charging Party admitted to calling the Head of School a "liar" who is "[not] honest, [not] forthright, [not] upstanding, [not] moral, [not] considerate [and] much less intelligent or wise." GC-3; Tr. 70:17-22. In addition to claiming authorship of these opprobrious comments at the April meeting, the Charging Party also "apologized" for his "angry" words and clarified that "of course" he no

longer felt that way. Tr. 70:11-22. Indeed, in follow-up e-mails with the administration, the Charging Party repeatedly admitted that his February 6, 2014 e-mail was "unprofessional" (R-5) (E-mail from the Charging Party to Ellen Stein *et al*. dated May 22, 2014), that he "regretted" its content (R-5), and that his "angry" (*id*.) words were never intended for the "eyes" (*id*.) of Dalton administrators.

During this April meeting, Mr. Best reminded the Charging Party that he had previously warned him about sending offensive e-mails (R-6) (Typewritten Notes authored by Ellen Stein May 27, 2014) and further informed the Charging Party that Dalton would not be renewing his teaching contract for the 2014 – 2015 academic year. Tr. 112:1-5. Accordingly, Ms. Stein and Mr. Best "gave [the Charging Party] a choice of continuing to teach through the end of the term" assuming he could "hold things together" (R-6), or "leaving immediately." Tr. 72:2-4. Ultimately, the Charging Party elected to remain at Dalton until the end of the academic year. Tr. 72:16-18.

Dalton's decision to rescind the Charging Party's teaching contract for the 2014 – 2015 academic year was neither brash nor unilateral. In fact, the record confirms that various members of the Dalton administration and members of the Board of Trustees discussed and deliberated over this topic over the span of several weeks. Tr. 168:7-10. Ultimately, the Dalton administration elected to rescind the Charging Party's renewal contract not only because his comments about the senior administration were plainly "[un]professional, inappropriate, [and] uncollegial" (Tr. 138:20), but also because the Charging Party lied about making these statements (Tr. 138:8-14), and because the administration had already previously warned the

Charging Party – to no avail – that his continued employment at Dalton was contingent on his ability to communicate in a more respectful and collegial manner.[4] *See* R-3.

G. The Dalton Administration's May Meetings with the Charging Party

The Charging Party testified that he participated in two additional in-person meetings with Ms. Stein and Mr. Best on or around May 9, 2014 and on or around May 19, 2014, respectively. Tr. 73:1-7; Tr. 74:2-4. When asked to explain why Dalton chose to rescind his teaching contract, as explained above, Ms. Stein repeatedly cited not only the Charging Party's lack of forthrightness with respect to the unprofessional remarks he made about the administration in his February 6, 2014 e-mail, but also his repeated unprofessional communications and comportment despite previous warnings. Tr. 138:4-7; R-6. In response to these reasons, the Charging Party "offered that he did not expect [that] his comments about the administration [would] get back to [her]." R-6.

THE JUDGE'S DECISION

The Judge issued his Decision on June 1, 2015, and erroneously concluded that Dalton violated Section 8(a)(1) of the Act in rescinding the Charging Party's employment contract for the 2014 – 2015 academic year, and by purportedly "interrogating" the Charging Party about his allegedly "protected concerted" activity at the parties' March meeting. As detailed below, the Judge's decision was contrary to the substantial weight of the evidence in the record and contrary to Board and federal law. For the reasons detailed below, the Board must dismiss the Complaint.

STANDARD OF REVIEW

It is well settled that the Board reviews an administrative law judge's decision *de novo* and is no way bound by a trial judge's findings of fact. *Standard Dry Wall Products, Inc.*, 91

[4] In fact, in an effort to promote "kinder" interactions among colleagues (Tr. 89:10-14), the Dalton administration engaged an independent consultant to hold a training at Dalton on the subject of "cooperation" (*id*.) and collegiality.

NLRB 544 (1950). In fact, a failure of a judge to explicitly review and meaningfully consider all of the relevant evidence in the record warrants dismissal of the complaint. *Jewel Bakery, Inc.*, 268 NLRB 1326 (1984). Furthermore, it is well settled that an administrative law judge's application of the improper legal standard is reversible error. *Northport Health Servs., Inc. v. N.L.R.B.*, 961 F.2d 1547 (11th Cir. 1992).

QUESTIONS PRESENTED

1. Whether the Judge erred in concluding that the Charging Party's February 6, 2014 e-mail thread was "protected concerted" activity;
2. Whether the Judge erroneously concluded that the General Counsel had met its burden in establishing that the Dalton administration knew of the purportedly "protected concerted" nature of the Charging Party's February 6, 2014 e-mail communications;
3. Whether the Judge applied the correct legal standard in determining that the Charging Party's opprobrious February 6, 2014 e-mail did not lose the protections of the Act;
4. Whether the Judge erred in failing to apply the *Atlantic Steel* analysis in the instant matter;
5. Whether the Judge erred in finding that the Dalton administration unlawfully "interrogated" the Charging Party during the parties' March 11, 2014 discussion;
6. Whether the Judge erred in failing to conclude that the Dalton administration's decision not to renew the Charging Party's teaching contract for the 2014 – 2015 academic year was predicated on the Charging Party's inappropriate and disloyal conduct.

ARGUMENT

A. The Judge Erred in Concluding that the Charging Party's February 6, 2014 E-mail Thread was "Protected Concerted" Activity.

Section 7 of the Act provides that in order for an activity to be protected, it must be "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Indeed, the "mutual aid or protection" clause of Section 7 of the Act protects employees who "seek to improve terms and conditions of employment." *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991). Here, as explained in greater detail below, the Charging Party's February 6, 2014 e-mail thread did not constitute "protected concerted" activity within the meaning of the Act because it did not relate to terms and conditions of employment.

As set forth in Respondent's post-hearing brief, it is well settled that the "conditions of employment which employees may seek to improve are sufficiently well identified to include wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities and the like." *New River Indus., Inc.*, 945 F.2d at 1294. Contrastingly, precedent confirms that the "expression of criticism about management . . . is not a condition of employment that employees have a protected right to seek to improve." *Id.* at 1295 (holding that a letter criticizing management was not a medium intended to resolve or call attention to conditions of employment, and therefore was not "protected concerted" activity under the meaning of the Act); *Media Gen. Operations, Inc. v. NLRB*, 560 F.3d 181, 189 (4th Cir. 2009) (holding that an "opprobrious *ad hominem* attack on a supervisor" was unprotected by the Act); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 751-53 (4th Cir. 1949) (holding that an

employee's circulation of a petition that called for resignation of a supervisor who imposed discipline was not protected).

Here, the Charging Party's February 6, 2014 e-mail thread did not constitute "protected concerted" activity within the meaning of the Act in part because there is no evidence that the Charging Party's colleagues interpreted his comments as an expression of *shared* concerns over working conditions. Indeed, the record does not support any such conclusion. Rather, the record establishes that there was a community-wide consensus that Dalton had properly dealt with the controversy surrounding *Thoroughly Modern Millie*. Tr. 41:16 ("[E]verybody seemed happy with the work of the students."). In fact, Ms. Stein testified that, with the exception of the Charging Party's February 6, 2014 e-mail that was brought to Ms. Stein's attention by the Chair of the Theater Department, the Dalton administration never received any written or verbal complaints about *Thoroughly Modern Millie* from any members of the Theater Department (Tr. 133:13-25), and was not aware of any such complaints. Given that Dalton did not reduce Theater Department employees' pay or benefits or otherwise create onerous working conditions in connection with the *Thoroughly Modern Millie* controversy (Tr. 133:9-25), it is unsurprising that the Dalton administration did not receive a single complaint. *Id*. Indeed, the Charging Party testified that the Theater Department "had already discussed how to move forward with the situation" without seeking to confer with – or make any complaints to – the Dalton administration. Tr.71:2-3.

Indeed, although in his Decision the Judge states that "[a] lot of work had to be done in a very short time" with respect to the revised production of *Thoroughly Modern Millie* (D. 3:5), the Charging Party testified that, while he was "restaging the piece" (Tr. 41:7-11), he actually "*stopped working*" on both scenery and costumes. *Id*. (emphasis added). Furthermore, although

the Judge states that the Charging Party learned "that a musical would be performed three days before the play was scheduled to open" (D. 3:5), this unsupported factual finding is directly contradicted by the record. Although the Charging Party testified that he had "a week" (Tr. 41:6-11) to prepare for the production of the play in "*modified form*" (Tr. 40:17-19) (emphasis added), the record confirms that preparation for the production of *Thoroughly Modern Millie* actually began a full *eight months* in advance of the production. Tr. 34:22-25.

However, the subject matter of the Charging Party's February 6, 2014 e-mail thread did not include employment terms and conditions or commentary on any "extra . . . time" the Charging Party purportedly spent on the play to accommodate revisions to the production of the musical. Tr. 43:6-7. In fact, in his February 6, 2014 e-mail, the Charging Party actually directs his colleagues in the Theater Department to "forget how hard poor little [they] worked . . . *who cares*" (GC-3) (emphasis added). Instead, the Charging Party's February 6, 2014 e-mail thread was a self-confessed "gripe" about how the senior administration had handled the *Thoroughly Modern Millie* controversy with its constituent community – specifically, its decision to speak to the parents and students about the controversy directly. Tr. 68:16-19. Indeed, the record confirms that, despite the Charging Party's self-confessed "gripes" with the senior administration's handling of the *Thoroughly Modern Millie* controversy, the Charging Party fully recognized that the senior administration "had no obligation to consult with [him or with the Theater Department] on everything that is . . . put on [its] plate each day in terms of running the

school" (Tr. 102:11-13), including but not limited to its interaction with parents and students about the *Thoroughly Modern Millie* controversy.[5]

Indeed, it is well settled that where, as here, a charging party admits that he was "just venting" or griping and his comments are motivated largely by "frustration," such conduct does not rise to the level of concerted activity. *Public Serv. Credit Union*, Case 27-CA-21923, 39 N.L.R.B. AMR 33 (2011); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 (1980) (stating that "public venting of a personal grievance, even a grievance shared by others" does not constitute concerted activity) Here, the record unequivocally confirms that the Charging Party was merely venting to express "hurt" (R-5) and "[a] feeling of betrayal." *Id.*

Additionally, the Board's test for concert is whether the activity is engaged in "*with or on the authority of other employees*," and not solely by and on behalf of the employee himself. *Tasker Healthcare Grp.*, 41 N.L.R.B. AMR 1 (2013) (emphasis added). Here, the Charging Party did not act with any such authority from his colleagues in the Theater Department. In fact, the Chair of the Theater Department elected to single out the Charging Party's February 6, 2014 e-mail communication and to report it to the Head of School as unrepresentative of the collective sentiments of the Theater Department.[6] Indeed, the Board has held that an employee's e-mail communications are not drafted with or on the authority of his colleagues where, as here, the employee's colleagues find the e-mail communications "inappropriate" and "report[s] them to

[5] Furthermore, the Charging Party acknowledged on the record that the re-write of *Thoroughly Modern Millie* was not a unilaterally-imposed mandate handed down by the Dalton administration, but was a necessary response to school-constituent outrage given the "offensive" (Tr. 42:7) stereotypes in the play's original script. In fact, the Charging Party even testified that he fully understood not only "why people would object to certain aspects of the [original] script" (Tr. 43:23-24), but also the impetus behind modifying the production.

[6] Even if the at-issue communications had in fact revealed the "general morale of the employees," it is well settled that the "expression of criticism about management" and *ad hominem* attacks such as referring to the Head of School a "liar" (GC-3) is not "protected activity" within the meaning of the Act. *New River Indus., Inc.*, 945 F.2d at 1295.

[the] manager." *Miami Jewish Health Sys.*, 39 N.L.R.B AMR 41 (2011); *Intermountain Spec. Abuse Treatment Center*, 39 N.L.R.B. AMR 39 (2011) (holding that the charging party was not engaged in concerted activity where the charging party's co-worker "not only did not join in the 'discussion' but viewed the allegedly concerted posting as inappropriate and reported it to the Director"). Tellingly, the Chair of the Department's decision to single out and report the Charging Party's e-mail – but to withhold other internal e-mails exchanged among members of the Theater Department – confirms that the Charging Party was not acting with the authority or support of his colleagues when he drafted the opprobrious e-mail on February 6, 2014. In fact, when asked about whether he had received any input (or response) from his colleagues within the Theater Department, the Charging Party testified as follows:

Question: They are your words. Your colleagues didn't edit this?

Answer: No they didn't.

Tr. 110:8-9.

Applying the same standard articulated in *Miami Jewish Health Sys.*, the Board must find that the Chair of the Theater Department's decision to disassociate the Theater Department from the Charging Party's remarks, and to single-out the Charging Party's email for reporting to the Head of School, negates a finding that the Charging Party was expressing group-wide views and engaged in "concerted activity" under the meaning of the Act at the time in question.

It is well-settled that concerted activity also includes "circumstances where individual employees seek to initiate or induce or prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers Indus. (Meyers II)*, 281 NLRB 882, 887 (1986). Board law explicitly emphasizes that "the question of whether an employee is engaged in concerted activity is, at heart, a factual one, *the fate of a particular*

case rising or falling on the record evidence." *Meyers Indus.*, 268 NLRB 493 (1984) (emphasis added). Here, the record evidence contradicts the Judge's finding that the Charging Party's e-mails were "clearly intended to induce group action." (D. 7:25), and instead establishes that the Charging Party's February 6, 2014 e-mail communications were merely "part of the department discussion." (Tr. 67:10). In fact, the Charging Party testified that he explicitly discouraged his colleagues from bringing anything to the attention of the administration or "demanding" anything from the administration (R-5). Tr. 59:20-25; Tr. 59:1; GC-6 (Portion of February 6, 2014 E-mail Thread Addressed from the Charging Party to the Theater Department) ("I really don't think the department should send this letter to the administration.").

Ignoring the weight of the evidence, the Judge selectively refers to only *one portion* of the Charging Party's February 6, 2014 e-mail thread in his Decision while willfully "ignoring" the remaining portion of the email thread (D. 4:1). However, the evidence plainly indicates that the Charging Party's February 6, 2014 e-mail thread had *two* critical components. Indeed, the idea that the Charging Party's e-mails were "clearly intended to induce group action" (D. 7:25) is not supported by the record, and the assertion that the Charging Party's February 6, 2014 e-mail communications were a predicate for group action are belied by the *second portion* of the Charging Party's February 6, 2014 e-mail thread (GC-6), which the Judge inexplicably disregarded.[7]

[7] Ignoring the weight of the evidence, the Judge erroneously concluded that the at-issue, allegedly "protected concerted" e-mail was the "*second e-mail sent to other department members.*" (D. 4:2) (emphasis added). However, in evaluating whether the Charging Party was engaged in "protected concerted" activity, the Judge erred in not considering *both portions* of the Charging Party's February 6, 2014 e-mail thread. *SB Tolleson Lodging, LLC d/b/a Best Western*, 2015 WL 1539767 (N.L.R.B. Div. of Judges, April 7, 2015) (citing *National Specialties Installations*, 344 NLRB 191, 196 (2005) ("The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances.")

In reaching the erroneous conclusion that the Charging Party's February 6, 2014 e-mail "was clearly intended to induce group action" (D. 7:24-25), the Judge improperly focuses his attention on the Charging Party's use of the pronouns "we" and "us" in his February 6, 2014 e-mail thread to further support his contention – contrary to the weight of the evidence – that the Charging Party was intending to induce group action. GC-7 (February 6, 2014 4:38:18 P.M. E-mail Addressed from the Charging Party to the Theater Department). However, the Judge clearly erred in failing to consider *both* portions of the Charging Party's February 6, 2014 e-mail thread in evaluating whether the Charging Party was engaged in "protected concerted" activity, given that both communications were *part of the same e-mail thread, sent on the same day, to the same recipients*. Indeed, the Judge, without explanation, fails to consider the portion of the e-mail which the Charging Party testified he also created and sent on February 6, 2014 (Tr. 61:8-9) from his Dalton computer (Tr. 61:12-18) in which he plainly states that "*the department should [not] send this letter to the administration*" (GC-6) (emphasis added), and that "[n]o apology is appropriate." *Id*. Instead, in considering GC-7 in isolation, the Judge characterizes the "group action" as "suggesting that theater staff request an apology from Dalton management." (D. 5:15). However, it is the *second portion – i.e.*, the continuation – of the Charging Party's February 6, 2014 e-mail exchange that explicitly characterizes the idea of an "apology" as "totally ridiculous." GC-6.

Indeed, the facts of the instant case resemble those lines of cases where the Board has found no protected concerted activity in the absence of evidence of a "nexus" between employee discussions and group action. *Daly Park Nursing Home*, 287 NLRB 710 (1987). In *Daly Park*, the Board found that an employee's discussion with co-workers did not constitute protected activity because "there [was] nothing more than a conversation between employees relating their

opinion on matters of interest to other employees" and the conversation "[did] not indicate that 'group action [was] . . . contemplated." *Daly Park*, 287 NLRB at 711.

Here, the record confirms that the Charging Party's February 6, 2014 emails thread was not an attempt to "get other employees to take any action" for mutual protection. *Public Serv. Credit Union*, 39 N.L.R.B. AMR 33 (2011). In fact, when the senior administration provided the Charging Party with an opportunity to bring any purported group complaints to the administration's direct attention, the Charging Party refused to do so, stating that he "could not do that." Tr. 75:21-25; Tr. 76:1. Instead, the Charging Party explicitly admitted that his allegedly "concerted" e-mail was "never intended for [the administration's] eyes." R-5.

Furthermore, it is well-settled that conversations between employees that are mere "griping" are not protected under the Act. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). In *Mushroom Transp. Co.*, the court held that a conversation may constitute "concerted" activity when "at the very least it was engaged in with the object of *initiating or inducing or preparing for* group action" or if it bears some relation to group action. *Id*. at 685 (emphasis added). In contrast, if it "looks forward to no action at all, it is more than likely to be griping." *Id*.; s*ee also Asheville Sch., Inc.*, 347 NLRB No. 84 (2006) (holding that the at-issue communication was a "gripe" where there was no evidence that the charging party was looking toward group action or seeking to act in concert with any other employees relating to any term or condition of employment).

As discussed in the foregoing paragraphs, in his Decision, the Judge selectively replicated the language of *only a portion* of the Charging Party's first February 6, 2014 e-mail thread, while conveniently omitting *the second portion* of this February 6, 2014 e-mail thread in which the Charging Party denounces the prospect of group action as "totally ridiculous" (GC-6) and

explicitly states that he "really [didn't] think the department should send this letter." (GC-6). Such sentiment confirms that the Charging Party was merely expressing a "gripe" about the senior administration. *Id*. Although the Judge correctly notes in his Decision that the "fact that no group address was ever made to management" (D. 7:25) does not remove the communication from the protections of the Act, the fact that the Charging Party explicitly denounces the prospect of group action confirms that his communications were mere "griping" rather than preparation for group action.

Further evidence that the Charging Party did not intend to incite group action is the fact that he also "apologized" to the senior administration for what he characterized as "angry" words and clarified that "of course" he no longer felt that way. Tr. 70:11-22. Indeed, in follow-up e-mails with the administration, the Charging Party repeatedly admitted that the first portion of his February 6, 2014 e-mail thread was "unprofessional," that he "regretted" it's content, and that his "angry" words were never intended for the "eyes" of Dalton administrators. R-5.

B. The Judge Erroneously Concluded that the General Counsel Had Met its Burden in Establishing that the Dalton Administration Knew of the Purportedly "Protected Concerted" Nature of the Charging Party's February 6, 2014 e-mail Communications.

It is well-settled Board law that in a "discharge or layoff case, the issue is whether the decision-maker *knew* of the concerted protected activity, *not whether the decision-maker should or reasonably could have known*." *Reynolds Elec., Inc.*, 342 NLRB 156, 157 (2004) (emphasis added). In *Reynolds*, the Board held that the record fell short of establishing that the decision-maker had actual knowledge of any "protected concerted" activity. The Board has explicitly held that the General Counsel presents a *prima facie* case that an employer discharged an employee in violation of Section 8(a)(1) *only* when the evidence shows that "the employer knew of the concerted nature of the activity." *Amelio's*, 301 NLRB 182, 182 (1991). Although the

Judge appropriately noted during the hearing that, in order to establish a *prima facie* case of a Section 8(a)(1) violation, the General Counsel has the burden of establishing that "the employer *[knew] of the concerted nature of the complaint*" (Tr. 124:1-4) (emphasis added), the Judge improperly concluded that the General Counsel had met its burden. Here, such conclusion is contrary to the evidence in the record.

Indeed, even assuming *arguendo* that the Charging Party's e-mail communications with his colleagues were "protected concerted" activity – which Respondent maintains that they were not – the senior administration neither knew of any "protected concerted" activity nor should or reasonably could have known. In finding that the senior administration had knowledge of the Charging Party's "protected concerted" activity, the Judge erroneously relied on the General Counsel's cross-examination of the Head of School. The Judge's reliance on this testimony is misplaced. Notably, the Judge focused on the following testimony:

Question:	And you knew that David had sent this e-mail to members of the theater department; isn't that right?
Answer:	Correct.
Question:	And the theater department includes Mr. Brune's colleagues, correct?
Answer:	And supervisor, correct?
Question:	Okay, so that is Bob Sloan, Kevin Gallagher, Meg Zeder and Allen Kennedy; is that right?
Answer:	Correct.
Question:	Those are the members of the theater department. You said his supervisor; who do you mean?
Answer:	Bob Sloan.
Question:	And these people who I just listed, those are the only individuals on the theater department e-mail listserv; is that right?

Answer: I believe so.[8]

Tr. 24-25; D. 8:1-15.

The Judge incorrectly posits that "[t]his exchange establishes that [Ms.] Stein knew that [Mr.] Brune had sent the e-mail to other employees" and concludes – contrary to the weight of the evidence – that "[a]t no point during the hearing did [Ms. Stein] contend that she thought the e-mail had been sent only to Sloan." D. 8:18-19. However, no such inference can be drawn from this testimony. In fact, in relying on this testimony alone, the Judge has implicitly conceded that there is no direct evidence in the record that the senior administration had knowledge of the Charging Party's activity being concerted.

Just as the Board did in *Amelio's*, the Board in the instant matter must reject the notion that the foregoing testimony "warrants an inference of such knowledge." *Amelio's*, 301 NLRB at 183. Furthermore, the fact that the Charging Party's supervisor provided the senior administration with a portion of the Charging Party's February 6, 2014 e-mail thread is similarly "insufficient to fulfill the General Counsel's affirmative obligation to establish knowledge of concerted activity by the Respondent" under the *Amelio's* analysis. *Id.*

Contrary to the Judge's reasoning, the requisite "knowledge" to which the Board in *Amelio's* is referring is *the knowledge of whether the activity was concerted, not knowledge of whether the charging party sent his or her allegedly "protected concerted" communication to others*. Therefore, in the instant matter, there is no merit to the Judge's suggestion that the Head of School knew about the allegedly "protected concerted" nature of the Charging Party's e-mail communications when she "saw" that the Charging Party's e-mails "were sent to the theater

[8] The evidence confirms that at the time the senior administration met with the Charging Party in March, it was unaware of the exact recipients of the Charging Party's e-mail. GC-3. The Charging Party's supervisor provided the Head of School with only the text of the Charging Party's opprobrious e-mail.

department." D. 7:32. Knowledge of the mere existence of part of the Charging Party's February 6, 2014 e-mail thread is in no way equivalent to knowledge of the allegedly concerted nature of such communications.

Indeed, during the hearing, the General Counsel offered multiple e-mails into evidence purportedly authored by members of the Theater Department in an effort to show that the Theater Department was engaged in department-wide discussions about the musical. *See* GC-5 – GC-9. However, prior to the hearing date, the senior administration was not privy to these group-wide e-mail exchanges. To wit, the evidence confirms that "*none of the . . . e-mail [chains] were sent to the administrators*." Brune Aff. ¶ 14 (emphasis added). In fact, even the Judge concedes this point in his decision. D. 3 at fn.3 (the Charging Party's "e-mails were sent only to fellow members of [the] theater department. They were not sent to, and were not accessible by, Dalton's administration."). In addition to testifying that he did not provide the senior administration with any department-wide e-mails (GC 5 – GC 9), the Charging Party also testified that he did not even *mention* these group-wide e-mail communications to anyone. Tr. 67:7-10.[9] For example, the Charging Party testified at the hearing:

Question:	And do you know if this e-mail was ever sent to – not to the department but to any of the intended recipients?
Answer:	No, it was not.
Question:	And do you know if the "new language" . . . was ever sent to the potential recipients . . . Jim, Lorri and Ellen?
Answer:	As far as I know, *none of this material* was sent to the administration, Jim, Lorri or Ellen.
Question:	Did you send it to anyone other than those in the department?

[9] Moreover, as explained above, the fact that the Chair of the Theater Department singled out the Charging Party's e-mail from the other e-mails that were being circulated among members of the Theater Department establishes that the Charging Party's peers did not view his communication as part of any productive dialogue among Theater Department members, but rather as a distraction and a potentially destructive communication that warranted appropriate action by Dalton's administration.

Answer: No.

Question: Do you know if anyone else in the department, any recipient sent it on to anyone else?

Answer: As far as I know, this was not sent to anyone else.

Tr. 54:1-3; Tr. 54:24-25; Tr. 57:13-15; Tr. 66: 19-25; Tr. 67:1 (emphasis added).

Ms. Stein's trial testimony further corroborates the Charging Party's testimony with respect to this issue. The evidence confirms that Dalton had *no knowledge* of either the existence, or the content, of any group discussions amongst the members of the Theater Department at the time it decided not to renew the Charging Party's employment contract. The Head of School testified at trial:

Question: Other than the e-mail authored by [the Charging Party], do you recall receiving any e-mails from the theater department representatives about TMM and its production?

Answer: No other emails.

Tr. 133:15-18.

In light of this unambiguous testimony, the General Counsel was not able to meet its "affirmative obligation to establish knowledge of concerted activity." Amelio's, 301 NLRB at 183. In light of Dalton's policy of not reading faculty e-mails (Tr. 75:17-18), prior to receiving a copy of the text of the Charging Party's e-mail from the Charging Party's supervisor, the senior administration had no knowledge of any group e-mail activity amongst the Theater Department members with respect to *Thoroughly Modern Millie* or any other issues. Furthermore, when the Charging Party's supervisor brought the text of the Charging Party's e-mail to the Head of School's attention, he did not provide any portion of the Theater Department's purported "chain" of e-mails (Tr. 100:4-5), or even mention the existence of any such e-mails. D. 3 at fn.3. Therefore, there is no factual basis for the Judge's finding of "protected concerted" activity here.

In fact, the senior administration first learned of the existence of an e-mail "thread" or discussion among members of the Theater Department, only *after* it had already made its decision not to renew the Charging Party's employment contract. The Charging Party concedes that the first time he even alerted the Head of School to the existence of a department-wide e-mail thread was during the administration-initiated meeting on or around April 17, 2014 during which time the administration informed him that his offer of employment for the 2014 – 2015 academic year had been rescinded. Tr. 75:22-23. The Charging Party further testified that after he shared this information with Ms. Stein during this meeting, she asked him to "send her the other emails in the [Theater Department] thread." Tr. 75:25; Tr. 76-1. However, the Charging Party testified that he refused to do so, only further confirming the fact that the senior administrators had no knowledge of the content of any of the Theater Department's group-wide, internal e-mail communications.

C. The Judge Applied the Wrong Legal Standard in Determining that the Charging Party's February 6, 2014 E-mail Thread did not Lose the Protections of the Act.

In his Decision, the Judge duly notes that the protection of concerted activity is not absolute and that an employee may forfeit the Act's protection while "engaging in protected activity" (D. 8:25), depending in part "on when and where the allegedly protected conduct" occurs. *Id.* Indeed, in his Decision, the Judge correctly articulates the multifactor criteria for evaluating whether an employee's conduct loses the protection of the Act under the framework set forth by the Board in *Atlantic Steel Co.*, 245 NLRB 814 (1979). However, without explanation, the Judge erroneously applies the criteria for determining whether an employee's conduct loses the protection of the Act under *Triple Play Sports Bar & Grille,* 361 NLRB No. 31 (August 22, 2014), while noting that the *Triple Play* framework is applicable only "in cases

addressing *off-duty, off-site communications with other employees or third parties using social media*." (D. 9:1) (emphasis added) – thereby rendering it inapplicable here.

Here, the Judge's reliance on the *Triple Play* criteria is inapposite for several reasons. First, the purportedly protected conduct at issue in *Triple Play* was an off-duty, off-site Facebook discussion, including comments added from the employee's cellular phone. However, off-duty, off-site communications on social media are not at issue here. In the instant matter, the weight of the evidence, including the Charging Party's testimony at the hearing, confirms that the at-issue e-mail was not an off-duty or off-site communication using social media channels or other online communications. In fact, the Charging Party testified that he sent the at-issue e-mails "from the office computer" (Tr. 61:17-18). The Charging Party further testified that he sent two separate e-mails on February 6, 2014 in direct response to e-mails he received from his supervisor at 9:07:45 a.m. (GC-4) and another member of the Theater Department 10:26 a.m. (GC-5), respectively – while he was on duty in his official capacity at Dalton. Another fact that distinguishes the instant matter from *Triple Play* is that in *Triple Play*, the Board explicitly noted that "[n]o manager or supervisor participated in the discussion." *Triple Play*, 361 NLRB at 16. However, in the instant matter, it is the Charging Party's supervisor that initiated the discussion.

Next, the substance of the discussion in the instant matter is easily distinguishable from the substance of the discussion at issue in *Triple Play*. In *Triple Play*, the Board affirmed the administrative law judge's finding that *Triple Play* employees were engaged in protected concerted activity "because the discussion concerned workplace complaints about tax liabilities, the Respondent's tax withholding calculations, and [an] assertion that [an employee] was owed back wages." *Triple Play*, 361 NLRB at 11. Furthermore, the plain language of the Facebook discussion at issue in *Triple Play* confirms that the employees were preparing for group action.

For instance, one of the comments read: "I'm calling the labor board to look into it [because] he still owes me about $2,000.00 in paychecks;" and "I told [management] we will be discussing it at the meeting" and "discuss good [because] I won't be there to hear it. And let me know what his excuse is." *Triple Play*, 361 NLRB at 55-56. Even then, the Board in *Triple Play* noted that importance of remaining "mindful of the balance to be struck between employee rights under Section 7 and legitimate employer interests." *Triple Play*, 361 NLRB at 5. As explained in more detail below, in the instant matter, the Judge ignored these legitimate employer interests.

The Judge's reliance on *Pier Sixty*, 362 NLRB No. 59 (MaR. 31, 2015), is similarly misplaced. *Pier Sixty* is distinguishable here. First, *Pier Sixty* appears in the collective bargaining context. The at-issue communications were Facebook comments directly addressing union representation, including comments such as "Vote YES for the Union." *Pier Sixty*, 362 NLRB No. 59 at 5. Putting the substance of the comments in *Pier Sixty* aside, the Board affirmed the administrative law judge's finding that the charging party's union-organizing comments were not so egregious as to exceed the Act's protections where the comments in question were made "*in a non-work setting and did not occur during a conversation with a supervisor*." *Pier Sixty*, 362 NLRB No. 59 at 8 (emphasis added). Here, as addressed in the foregoing paragraphs, the Charging Party's e-mail comments were not only made in a work setting, but were directly addressed to the Charging Party's supervisor, as well as the other members of the Theater Department.

D. The Judge Erred in Failing to Apply the *Atlantic Steel* Analysis in the Instant Matter.

First, the Judge gives the *Atlantic Steel* factors only a cursory treatment before rejecting their applicability in the instant matter. *Atlantic Steel* and its progeny have established that an employee's purportedly concerted activity or comments are unprotected if, in the course of

engaging in such activity, the employee uses "sufficiently opprobrious, profane, defamatory, or malicious language." *Media Gen. Op., Inc. v. McMillen*, 12-CA-24770, 2007 WL 601571 (N.L.R.B. Div. of Judges Feb. 22, 2007). In determining whether the employee's activity or communication is sufficiently opprobrious, the Board considers the following *Atlantic Steel* factors: "(1) *the place of the discussion*; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices." *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) (emphasis added).

Here, with respect to the first prong, as emphasized in Respondent's post-hearing brief, the "place of discussion" was the e-mail listserv of an independent, co-educational day school for school-aged children (Tr. 17:16-18), not the traditional "industrial setting" which the Act is designed to accommodate. *Carleton Coll. v. NLRB*, 230 F.3d 1075, 1081 (8th Cir. 2000). Indeed, established precedent distinguishes between the disparate application of the Act to "management-employee relations" and in contrast, to the "academic world." *Id*. In other words, "the context of the misconduct is key to deciding whether the misconduct is protected by the Act." *Id*. (internal citations and quotation marks omitted). Although courts have held that employees are "permitted some leeway for impulsive behavior when engaging in concerted activity," it is well settled that this leeway is not unlimited, but instead is balanced against an employer's right to maintain order and respect." *Pipe Realty Co.*, 313 NLRB 1289, 1290 (1994). While the *Carleton Coll.* Court held that an employer must tolerate "salty language" in an industrial context, this mandate of tolerance may not be "imposed blindly" on an academic environment where collegiality is "not only a legitimate academic interest, but a necessary one." 230 F.3d at 1081. Indeed, the *Carleton Coll.* court acknowledged that even the Supreme Court

of the United States has explicitly recognized "the importance of collegiality to academic institutions." *Id*.

Here, the Judge erred in ignoring the disparate application of the Act to different settings. The Judge states that there is no reason to "conclude that the Section 7 rights of teachers, who are protected by the Act, is any less than those of other employees." (D. 9 at fn. 12). However, there is a distinction to be made here. Respondent does not contend that the rights of teachers are "any less" but instead notes the judicially-recognized idea that as a *place of discussion*, the academic world is governed by different norms of conduct than the industrial setting. *Id.* Although the Judge fails to substantively address the "place of discussion" factor from *Atlantic Steel* and instead, notes only that the purported protected activity "was not a face-to-face outburst to management" (D. 9:5), the application of this factor alone militates against a finding that the Charging Party's opprobrious e-mail activity was protected under the Act.

In considering the "place of discussion" factor from *Atlantic Steel*, the Judge notes that the Charging Party's purportedly protected activity was not a "face-to-face outburst to management" (D. 9:5) and that the Charging Party's e-mail was "accessible only to fellow employees" and "was not intended to be seen by management and was not directly accessible to management." *Id*. However, these distinctions are inapposite here. As is the case in the instant matter, the outbursts in *Aluminum Co.*, 338 NLRB 20 (2002), a case which examined the place of discussion, did not involve "face-to-face meetings with management." 338 NLRB at 22. However, in concluding that the charging party's outbursts (which including *ad hominem* attacks) had lost the protection of the Act, the Board in *Aluminum Co.* considered that the outburst "could be overheard by co-workers" and "would reasonably tend to affect workplace discipline by undermining the authority of supervisors." *Id.* The Board in *Aluminum Co*. also

held that the charging party's "profanity far exceeded that which was common and tolerated in the workplace." *Id*. In fact, the Board determined that the charging party had lost the Act's protection despite the fact that "the record show[ed] that *some degree of profanity was quite common*" to the respondent's work environment. *Id.* Indeed, the Board explicitly noted that the record did not show that "*the degree and manner*" in which the charging party used profanity "*was common or accepted by anyone in the respondent's [workplace]*." *Id*. (emphasis added). Here, Ellen Stein testified to the fact that such conduct was "[u]nprofessional, inappropriate and against the code of ethics of the Dalton School." Tr. 24:21-22.

Indeed, the hearing record clearly establishes that Dalton's interest in fostering and maintaining mutual respect among faculty is a necessary interest in an academic setting. As discussed herein, Dalton's standards of professionalism and common and acceptable conduct are codified in "legitimate workplace rules" that govern norms of conduct in an academic setting. *See Carleton Coll.*, 230 F.3d at 1081; R-1; R-2. Dalton teachers are expected to "exhibit a spirit of willingness and collaboration," serve as "role models for students" and as "good colleagues" to their peers. (R-2 at 23). As previously established, in the at-issue e-mail in this matter, the Charging Party unabashedly refers to Dalton's Head of School as a "liar" who is "[not] honest, [not] forthright, [not] upstanding, [not] moral, [not] considerate [and] much less intelligent or wise." GC-3. Given the heightened importance of collegiality in the academic world, the Charging Party's description of the Head of School "evidenced his disrespect" of the administration and an "unwillingness to commit to act in a professional manner," thereby "render[ing] him unfit for future employment" at Dalton, and contributing to the reasons for Dalton's recission of the Charging Party's employment contract. *Carleton Coll.*, 230 F.3d at 1081.

Additionally, although the evidence introduced for the first time at the hearing establishes that the Theater Department was potentially engaged in an internal e-mail dialogue about *Thoroughly Modern Millie* after the performance of the musical (GC-5 – GC-9), the Charging Party's supervisor's decision to isolate the Charging Party's e-mail for disclosure to Dalton's Head of School is further evidence that the e-mail was sufficiently opprobrious – particularly in light of the academic context – to lose the protections of the Act.

With respect to the second and third prongs set forth by the Board in *Atlantic Steel*, the subject matter of the at-issue e-mail was the Charging Party's individual "griping" about the senior administration, not an expression of group-wide concerns concerning working conditions. The "nature" of the Charging Party's comments was "angry" (Tr. 70:16-17); in fact, the nature and tenor of the Charging Party's comments was so opprobrious and "angry" that the Charging Party testified it was never intended for the "eyes" of the administration, and that he "regretted" authoring it. *Id.*

Finally, with respect to the fourth prong, the Counsel for the General Counsel did not introduce a scintilla of evidence that the Charging Party's e-mail "outburst" was provoked by any unfair labor practices. The Judge specifically acknowledges this fact in his Decision. (D. 9 at fn. 10) ("Respondent did not commit any unfair labor practices related to the subject of the e-mail.") Resultantly, because all four prongs of the *Atlantic Steel* test indicate opprobrious speech, the Judge erred in failing to conclude that the Charging Party's e-mail outburst lost the protection of the Act.

Furthermore, the Judge's reliance on *Union Carbide Corp*. and *Ben Pekin Corp*. is inapposite. Both these cases are distinguishable here. In *Union Carbide*, 331 NLRB 356 (2000), the profane language "stayed within the frame work of the protection of the Act because [the

charging party] was legitimately pursuing" information about the terms and conditions of his employment. 331 NLRB at 361. The pursuit of such information is not at issue here. In *Ben Pekin Corp.*, 181 NLRB 1025 (1970), the Board held that an employee did not lose statutory protection when the employee suggested to other employees that the respondent may be embroiled in a bribery scheme. The Board acknowledged that if the charging party's comments had been "flagrant" or "extreme as to render him unfit for further service," these comments would have been unprotected by the Act. 181 NLRB at 1028. Here, the Charging Party's comments were "flagrant" and "extreme" for an academic context that places a high premium on collegiality.

E. The Judge Erred in his Finding that the Dalton Administration Unlawfully Interrogated the Charging Party.

The Judge erred in finding, *sua sponte*, that Dalton violated Section 8(a)(1) in "interrogating" the Charging Party on March 11, 2014, despite the fact that the General Counsel did not allege this violation in either the Complaint or the Amended Complaint. In *Champion Int'l Corp.*, the Board explicitly recognized that "[i]t is axiomatic that *a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is*." 339 NLRB 672, 673 (2003) (emphasis added). The Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. However, whether a matter has been fully litigated rests on "whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Springfield Day Nursery*, 362 NLRB No. 30 at *2 (2015).

Here, the only violation alleged in the Amended Complaint and contemplated and litigated by the parties was that Respondent violated Section 8(a)(1) of the Act when it elected not to renew the Charging Party's teaching contract. Indeed, Respondent did not have sufficient

notice of the claim to allow it to elicit facts through witness testimony that would disprove liability and was denied due process. *NYP Holdings, Inc.*, 353 NLRB 343 (2008) (reversing the administrative law judge's finding and dismissing the charging party's complaint in its entirety where the judge found a violation of the Act on "an alternate and unlitigated theory, thereby denying the respondent due process.").

Furthermore, the Judge's reliance on *Pergament* here is misplaced. In *Pergament*, the Board affirmed the administrative law judge's finding that the respondents were not prejudiced by the General Counsel's failure to amend the complaint to include an additional violation where the issue of the added violation "was fully litigated at the hearing." *Pergament United Sales*, 296 NLRB 333, 334 (1989). However, here, Respondent would be unfairly prejudiced if the Board were to consider the *ad hoc* interrogation claim.

Even assuming *arguendo* that the Board *were* to consider the merits of the unalleged and improper interrogation claim, the facts set forth at the hearing fail to establish that Respondent unlawfully interrogated the Charging Party. The Charging Party testified that the March 11, 2014 meeting was "essentially a debriefing meeting about the situation" (Tr. 68:10-11) during which the Charging Party explicitly states that *he* discussed the *Thoroughly Modern Millie* situation and was encouraged to express his "opinion" (Tr. 68:12). Although the Judge suggests that the meeting was "an investigation that was motivated by Respondent's animus towards Brune's protected e-mail" (D. 6 at fn. 5), the Charging Party testified that the parties did not discuss the February 6, 2014 e-mail at this meeting. According to the Charging Party, the "administration was interested in how [the Theater Department] felt" (Tr. 69:7) and therefore allowed the Charging Party to "discuss" (Tr. 68:11) and express his "opinion" (*Id.*) with respect to the *Thoroughly Modern Millie* situation. There is no evidence that Respondent "interrogated"

the Charging Party. The Board has held that the Act prohibits employers "only from activity which in some manner tends to restrain, coerce or interfere with employee rights . . . either the words themselves or the context in which they are used must suggest an element of coercion or interference." *Rossmore House*, 269 NLRB 1176, 1177 (1984) (citing *Midwest Stock Ex. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980)); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 31 (1980) (citing *A&R Transport, Inc. v. NLRB*, 601 F.2d 311, 313 (7th Cir. 1979)) (stating that the standard for determining whether an interview is coercive looks "to the totality of the circumstances, including the purpose of the interview, the entire statement made to the employee, and the scope of the questioning").

Here, the senior administration's March 11, 2014 conversation with the Charging Party was not coercive. In fact, the Charging Party's testimony reveals that the senior administration did not ask the Charging Party *a single question* about the Charging Party's communications with the Theater Department. The Charging Party's testimony confirms this fact. "We discussed – *I discussed* – the situation." (Tr. 68:10-12) (emphasis added). As such, it was at the Charging Party's initiative that this topic was ever the subject of an exchange between the parties at the meeting. Therefore, given that the March 11, 2014 meeting was merely a "debriefing meeting" (Tr. 68:10-11) during which the Charging Party was provided with an open forum to share his "opinion" (Tr. 68:12), the Board must decline to find such violation here. The record is devoid of evidence that any interrogation took place.

Additionally, even assuming *arguendo* that the Board were to find that the March 11, 2014 *was* an interrogation, it was not unlawful. It is well-settled that interrogations are not *per se* unlawful. In fact, "a *per se* approach has been rejected by the Board thirty years ago" because the Board determined that this approach "ignored the reality of the workplace." *Rossmore House*

at 1177. It is well-established that an employer may "exercise a limited privilege to interrogate employees" in the "investigation of facts concerning issues raised." *Springfield Day Nursery* at 18. Here, the Respondent was investigating "how the [Theater Department] felt." (Tr. 69:7-10).

As a practical matter, if the General Counsel has not alleged interrogation, a court should be circumspect about making a *sua sponte* finding that interrogation has occurred. If the General Counsel – who is well-versed on specific circumstances of this case – opted not to pursue an interrogation claim, the Judge should not have exercised his discretion to do so. Recognizing workplace realities, an employer must retain the ability to engage in factual investigations concerning misconduct by its employees. Indeed, as was the case here, this task often involves more than one managerial-level decision maker. Therefore, Dalton's decision to involve the three members of the senior administration did not convert the March 11, 2014 meeting into an unlawful interrogation.

Therefore, as it did in *Champion Int'l Corp.*, the Board must conclude that Respondent had no notice of the interrogation allegation and accordingly, must dismiss the Complaint.

F. The Judge Erred in Failing to Conclude that Dalton's Decision Not to Renew the Charging Party's Employment Contract was Predicated on the Charging Party's Inappropriate and Disloyal Conduct.[10]

[10] During the General Counsel's opening statement at the hearing, the General Counsel weakly asserted that there has been "a chilling effect on the Section 7 rights of the staff" at Dalton. Tr. 10:3-8. However, this unsubstantiated theory was fleetingly referenced *only* in the Counsel for the General Counsel's opening statement and not in the Charging Party's Complaint. As a result, no such finding of a "chilling" effect of any employees' section 7 rights is appropriate here. In the instant case, Dalton does not maintain any "work rule" that would reasonably tend to "chill" employees in the exercise of their rights under the Act. *N.L.R.B. v. Northeastern Land Serv., Ltd.*, 645 F.3d 475, 481 (1st Cir. 2011) (holding that an employer is in violation of Section 8(a)(1) of the Act when "it maintains a work rule that would reasonably tend to chill employees in the exercise of their section 7 rights") (internal citations and quotation marks omitted). Here, as in any other workplace, Dalton is entitled to enforce "legitimate workplace rules" that call for professional expectations for its faculty without running afoul of an employee's rights under the Act. To that end, Dalton's rules and responsibilities (R-2), do not in any way restrict its employees' Section 7 activity.

After a full and complete hearing of the issues in this case, Counsel for the General Counsel failed to make a *prima facie* showing to support even the inference that "protected concerted" conduct was a motivating factor in Dalton's decision not to renew the Charging Party's employment contract. In fact, as explained in more detail above, the Charging Party was not engaged in "protected concerted" activity, and even assuming he was, he ultimately lost the Act's protection. Moreover, the senior administration had no knowledge of any group activity – protected or otherwise – within the Theater Department at the time it rescinded the Charging Party's renewal contract.

The Judge's decision to discredit "any testimony from Respondent's witnesses suggesting that any conduct by [the Charging Party] prior to February 6, 2014 had anything to do with the rescission of his employment contract" (D. 6 at fn. 5) is without basis and goes against the weight of the evidence. As established by the record, the Charging Party's discharge was motivated by his "inappropriate behavior . . . in a school" (Tr.138:1-7) that ran "totally counter to the policies and ethics within the Dalton handbook." *Id*. This "inappropriate behavior" (Tr. 138:5) included "unprofessional written communications after a previous warning" (Tr. 138:4-7), and lying to the senior administration about making opprobrious comments about the administration. Tr. 138:8-10.

The weight of the evidence supports Respondent's contention that, in the context of the Charging Party's previous warnings for unprofessional communications, the Charging Party's lack of forthrightness when confronted with his opprobrious statements directed at the senior administration confirmed that the Charging Party was unable to function as a trustworthy and collegial professional within the framework of the Dalton community. *See* R-2. Indeed, the Board has held that "[t]he Act, of course, does not prevent an employer from making and

enforcing reasonable rules covering the conduct of employees on company time." *Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943). Indeed, the Act does not prevent Dalton from enforcing "reasonable rules" such as the expectation that all Dalton teachers remain professional at all times. (Tr. 84:13-17).

In addition, the Supreme Court of the United States has explicitly recognized that "the [A]ct does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *N.L.R.B. v. Local Union No. 1229, Int'l. Broth. of Elec. Workers*, 346 U.S. 464, 474 (1953). Indeed, it is well settled that "[t]he courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty." *Id.* Courts have further explained that when an employee "attacks" his or her employer, the attack will deprive the employee of Section 7's protection if it constitutes "insubordination, disobedience or disloyalty," which, the Court made clear, is "adequate cause for discharge." *Id.* at 475; *see also Endicott Interconnect Tech., Inc. v. N.L.R.B.*, 453 F.3d 532, 535-36 (D.C. Cir. 2006) ("[S]ection 7 of the [Act] . . . does not override the employer's authority to discharge 'for cause' under Section 10(c) of the Act, which expressly provides: 'No order of the Board shall require the reinstatement of any individual as an employee who has been . . . discharged, or the payment to him of any backpay, if such individual was . . . discharged for cause.'") (internal citations omitted); *see also George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992) ("Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty.")

Here, Dalton's decision to discharge the Charging Party was 'for cause' and was predicated on the Charging Party's unprofessional and disloyal "attack" of the senior administration that ran "totally counter to the policies and ethics within the Dalton community"

(Tr. 138:4-7), and that the Dalton administration deemed was "harmful to [Dalton's] commitment to fostering and maintaining a culture of collegiality, collaboration and respect." GC-10 at ¶¶1-2. The Act does not prevent the administration from discharging an employee for the violation of these rules or for "disloyal" behavior. *George A. Hormel & Co.*, 962 F.2d at 1064-65 (holding that the employer committed no unfair labor practice by discharging an employee who violated his duty of loyalty). In fact, it is well-settled that there "is no more elemental cause for discharge of an employee than disloyalty to his employer." *Int'l. Broth. of Elec. Workers*, 346 U.S. at 472.

Here, the Charging Party's February 6, 2014 e-mail thread concerning the senior administration was not only "unprofessional, inappropriate [and] uncollegial" (Tr. 138: 18-20), but also epitomized disloyalty. Admitting to his disloyalty, the Charging Party expressed that he not only "regret[ted] the content of the e-mail," but that he "regret[ted] the hurt [he] caused to all who . . . read it." R-5. In fact, in reflecting on his behavior, the Charging Party even admitted to the senior administration that he "would not write [the e-mail] today." *Id*.

CONCLUSION

It is evident that the Judge ignored, overlooked and improperly analyzed the weight of the evidence. For the foregoing reasons, the Board must not affirm the Judge's findings and must instead dismiss the Complaint in its entirety and deny the Charging Party's request for remedies.

Date: July 20, 2015
New York, New York

Respectfully submitted,

/s/ Raquel O. Alvarenga

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CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of **RESPONDENT THE DALTON SCHOOLS, INC.'S d/b/a THE DALTON SCHOOL BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR J. AMCHAN** in Case No. 02-CA-138611 via electronic filing through the National Labor Relations Board's website, www.NLRB.gov, upon:

Karen P. Fernbach
Regional Director
National Labor Relations Board
26 Federal Plaza Ste 3614
New York, NY 10278-3699

RESPONDENT THE DALTON SCHOOLS, INC.'S d/b/a THE DALTON SCHOOL BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR J. AMCHAN was also served, via electronic mail, upon Counsel for the General Counsel, as follows:

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RESPONDENT THE DALTON SCHOOLS, INC.'S d/b/a THE DALTON SCHOOL BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR J. AMCHAN was also served, via electronic mail, upon counsel of record for the Charging Party, as follows:

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Dated: New York, New York
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